UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

FRANCISCO GARCIA individually, on behalf of his minor child SILVARIO GARCIA and all others similarly situated	)	
Plaintiff(s),	)	Civil Action No. 1:07-CV-2363 TCB
vs.	)	
MICROSOFT CORPORATION	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Microsoft Corporation ("Microsoft") moves to dismiss Plaintiff's Complaint on the grounds that he fails to state a claim upon which relief may be granted. In support of its Motion, Microsoft shows the Court as follows:

I. INTRODUCTION

This is a case about a minor (Silvario Garcia) who misrepresented his age when forming an online contract and whose father (Plaintiff Francisco Garcia) now seeks to hold Microsoft liable for his son's misconduct. More specifically, Plaintiff alleges that Microsoft entered into a contract with Silvario Garcia that is unlawful because: (i)

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contrary to his written representations to Microsoft, Silvario Garcia had not reached the legal age of majority when he used his father's debit card to purchase an Xbox LIVE subscription over the Internet; and (ii) the contract contained a provision for automatic renewal. Plaintiff also challenges the validity of Microsoft's contracts with its adult subscribers, arguing that those electronic agreements violate the Statute of Frauds because: (i) they do not constitute written contracts; and (ii) they contain automatic renewal provisions. Based on these allegations, Plaintiff asserts claims on behalf of his son for fraudulent inducement, conversion, fraud and deceit, violation of the Georgia Deceptive Trade Practices Act, and unjust enrichment.

Each and every claim asserted in the Complaint fails to state a claim upon which relief may be granted:

- Plaintiff's fraud and deceit claim fails because: (i) Plaintiff has not alleged an express misrepresentation made by Microsoft; (ii) the "deception" Plaintiff alleges relates to an issue of law and cannot form the basis of a fraud claim; and (iii) the merger clause in the contract and its other terms foreclose a fraud and deceit claim.
- Plaintiff's fraudulent inducement claim fails for all of these same reasons. Additionally, Plaintiff has not rescinded the contract with Microsoft, a prerequisite to a fraudulent inducement claim.
- Plaintiff's conversion claim fails because, under Georgia law, money cannot be the subject of a civil action for conversion.
- Plaintiff's Deceptive Trade Practices Act claim fails because Plaintiff has not alleged that Microsoft engaged in any conduct expressly proscribed by the statute.
- Plaintiff's unjust enrichment claim fails because, under Georgia law, a plaintiff cannot recover under a theory of unjust enrichment when, as here, a

contract exists. Moreover, Microsoft conferred upon Silvario Garcia the benefit he bargained for, and Silvario Garcia's misrepresentation of his age bars any claim for unjust enrichment.

For these reasons, and as set forth more fully below, Federal Rule of Civil Procedure 12(b)(6) requires that the Complaint be dismissed.

II. FACTUAL BACKGROUND AND COMPLAINT ALLEGATIONS

Plaintiff alleges that his son, Silvario Garcia, used Plaintiff's debit card to purchase a one-year subscription to Microsoft Xbox LIVE service over the Internet. Compl. ¶ 8. When Silvario Garcia subscribed to Xbox LIVE service, he accepted Microsoft's Terms of Use. *See* Declaration of Ben Smith ¶ 6 (attached hereto as Exhibit "1"), Exh. B at ¶ 1 ("Terms of Use").[1] Those terms expressly provided: "You represent that you are at least 18 years old, and all information that you submit is correct." *See id*. Pursuant to the Terms of Use, Silvario Garcia could not obtain an Xbox LIVE subscription without affirmatively representing in writing that he was at least 18 years old. *See id*.

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[1] The Court may consider this contract without converting Microsoft's motion to dismiss into a summary judgment motion because: (i) Plaintiff refers to the contract in his Complaint; (ii) the contract is central to Plaintiff's claims; and (iii) the authenticity of the contract cannot be challenged. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment"); *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999). The Ben Smith Declaration attached hereto as Exhibit "1" authenticates and attaches the contracts at issue, as allowed under *Brooks*.

At the end of Silvario Garcia's one-year subscription, Microsoft renewed the subscription under an automatic renewal provision contained in the contract that he accepted when he subscribed to Xbox LIVE. Compl. ¶ 9. After Plaintiff complained to Microsoft, it promptly refunded the subscription fee. Compl. ¶ 11.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review

Although the Complaint need not contain "detailed factual allegations," it must nevertheless "'give the defendant fair notice of what the claim is . . . and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99 (1957)). In *Twombly*, the United States Supreme Court explained that "a formulaic recitation of the elements of a cause of action will not do" and that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965 (citations omitted). To that end, a plaintiff bears the burden to plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Id.* As shown below, Plaintiff's Complaint should be dismissed because it fails to sufficiently allege any viable cause of action.

B. Plaintiff's Fraud and Deceit Claim Should be Dismissed.

Plaintiff's fraud and deceit claim must be dismissed because Plaintiff fails to allege facts that – even when taken as true for purposes of this Motion to Dismiss –

satisfy the elements of such a claim. Under Georgia law, a claim for fraud and deceit requires proof that: (i) the defendant made a misrepresentation; (ii) the misrepresentation was knowingly and designedly false; (iii) the misrepresentation was made for the purpose and with the intent to deceive and defraud; (iv) the misrepresentation related to an existing or past fact; (v) the plaintiff did not know that the misrepresentation was false; and (vi) the plaintiff relied on the truth of the representation at issue and suffered a loss. *Howard v. DeKalb County Jail Staff*, 421 S.E.2d 309, 311 (Ga. Ct. App. 1992); O.C.G.A. § 51-6-2(a). Plaintiff falls far short of pleading facts sufficient to establish these elements.

1. Plaintiff does not allege any misrepresentation by Microsoft, nor does he allege reliance.

As a general principle of Georgia law, "there can be no fraud without an express misrepresentation." *Miller v. Lomax*, 596 S.E.2d 232, 237 (Ga. Ct. App. 2004). Plaintiff alleges that Microsoft "purposefully deceived" his son by "fraudulently procuring" initial Xbox LIVE subscription fees and automatic renewal fees "where such fees are based on unenforceable contracts." Compl. ¶¶ 36-38. Plaintiff does not, however, allege any misrepresentation made to his son by Microsoft. Moreover, Plaintiff fails to allege that his son detrimentally relied on any alleged misrepresentation. For these reasons alone, Plaintiff's claim for fraud and deceit should be dismissed.[2] *See English v. Liberty Mortgage Corp.*, 421 S.E.2d 286, 288 (Ga. Ct. App. 1992) (affirming dismissal of fraud claim where plaintiffs did not allege any misrepresentation); *Howard*, 421 S.E.2d at 311 (affirming dismissal of fraud claim where plaintiffs "failed to set forth any misrepresentation" in complaint); *Little v. Fleet Fin.*, 481 S.E.2d 552, 556 (Ga. Ct. App. 1997) (affirming dismissal of fraud claim where plaintiff failed to allege detrimental reliance on a false representation).

2. Representations regarding matters of law – like the enforceability of the contracts at issue – cannot give rise to fraud liability.

Plaintiff bases his fraud and deceit claim on the allegation that Microsoft (in some unspecified way) deceived his son regarding the enforceability of the contract that Silvario Garcia entered into with Microsoft.[3] *See* Compl. ¶¶ 36, 37. Georgia law is clear, however, that representations regarding matters of law cannot give rise to fraud liability. *See, e.g., Mabry v. Pelton*, 432 S.E.2d 588, 590 (Ga. Ct. App. 1993). As one Georgia court explained years ago:

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[2] Federal Rule of Civil Procedure 9(b) imposes on Plaintiff a heightened obligation to set forth the facts surrounding Microsoft's alleged fraud with particularity. Plaintiff's wholesale inability to even articulate the proper elements of fraud, coupled with his failure to plead such elements with the requisite particularity, warrants dismissal of Plaintiff's fraud-based claims.

[3] To the extent that Plaintiff purports to assert a claim for fraudulent omission, absent a confidential relationship (which Plaintiff has not alleged), there is no duty to disclose between the parties engaged in an arms' length transaction between a business and an individual. *See Citizens. & S. Nat'l. Bank v. Arnold,* 240 S.E.2d 3, 4 (Ga. 1977); *Limoli v. First Ga. Bank,* 250 S.E.2d 155, 157 (Ga. Ct. App. 1978); *Feltman v. Nat'l. Bank of Ga.,* 246 S.E.2d 447, 449 (Ga. Ct. App. 1978).

> Misrepresentations as to a question of law 'cannot constitute remedial fraud, because every person is presumed to know the law and therefore can not in legal contemplation be deceived by erroneous statements of law, and such representations are ordinarily regarded as mere expressions of opinion.'

Beckmann v. Atl. Refining Co., 187 S.E. 158, 159 (Ga. Ct. App. 1936). This remains the law in Georgia. *See Robbins v. Nat'l Bank of Ga.*, 246 S.E.2d 660, 664 (Ga. 1978) ("The mere allegations in the complaint, that the trustees and ancillary administrator failed to advise the appellant of the existence of the Pennsylvania statute, do not constitute facts which, if proved, would lead to the conclusion that fraud has been committed . . . ."); *Mabry v. Pelton*, 432 S.E.2d 588, 590 (Ga. Ct. App. 1993) (misrepresentations as to a question of law cannot constitute fraud); *Krawagna v. H & S Liquor, Inc.*, 356 S.E. 2d 684, 685 (Ga. Ct. App. 1987) (same); *Gignilliat v. Borg*, 205 S.E.2d 479, 484 (Ga. Ct. App. 1974) (same). Accordingly, Plaintiff's fraud and deceit claim must be dismissed.

3. The merger clause and other terms in Silvario Garcia's contract foreclose Plaintiff's fraud and deceit claim.

Silvario Garcia's contract with Microsoft contains a merger clause. *See* Terms of Use at ¶ 17 ("Except as expressly stated herein, this Agreement constitutes the entire agreement between you and Microsoft with respect to the Service, and it supersedes all prior or contemporaneous communications and proposals, whether electronic, oral or written, between you and Microsoft with respect to the Service.").[4] Accordingly, the only representations upon which Plaintiff may base his claim for fraud and deceit are those representations that exist in the contract. *See Ekeledo v. Amproful*, 642 S.E.2d 30, 22 (Ga. 2007) ("[A] merger clause operates as a disclaimer of all representations not made on the face of the contract."). The contract at issue expressly requires that: "You represent that you are at least 18 years old, and all information that you submit is correct." *See* Terms of Use at ¶ 1. Based on this express term and the merger clause, Plaintiff's claim that Microsoft somehow defrauded Silvario Garcia as to the legality of a contract entered into with a minor must fail.

4. *Plaintiff's allegation that Microsoft deceived his son into entering into a contract that purportedly violates the Statute of Frauds also fails as a matter of law.*

Plaintiff's allegation that Microsoft deceived his son by entering into electronic contracts with automatic renewal provisions "without securing written multiple-year contracts . . . in violation of the Statute of Frauds" also must fail. *See* Compl. ¶ 38. Georgia's Statute of Frauds provides that an "agreement that is not to be performed within one year from the making thereof" must be "in writing and signed by the party to be charged therewith or some person lawfully authorized by him." O.C.G.A. § 13-5-30(5). The purpose of the Statute of Frauds is to require certain types of agreements to be written, rather than oral, so that there can be no dispute as to the operative terms and "to prevent frauds and perjuries incident to the admission of parol testimony." *Kolb v. Holmes*, 427 S.E.2d 562, 563 (Ga. Ct. App. 1993).

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[4] The Terms of Use in effect when the subscription was renewed on September 28, 2006 contained this same provision. Declaration of Ben Smith ¶ 7, Exh. C at ¶ 20.

Contrary to Plaintiff's contention, the Xbox LIVE agreement is indeed a written instrument – a copy is attached to this Memorandum. The automatic renewal provision, evidently the basis for Plaintiff's Statute of Frauds contention, is a term of the written agreement and is spelled out in considerable detail, relevant excerpts of which appear below:

> 5.4 Subscription Renewal. If you are subscribed for a monthly subscription, then your subscription will automatically and continuously renew from month to month unless you cancel your subscription prior to the end of that month. If you are subscribed for longer subscription periods (e.g., 3, 6 or 12 months) then unless the terms of that subscription state otherwise, your subscription will automatically and continuously renew for such period at prices then in effect.

Terms of Use at ¶ 5.4. Accordingly, there can be no serious argument that the Xbox LIVE Agreement is an oral agreement, and Plaintiff's Statute of Frauds contention necessarily fails.

Plaintiff appears to allege that the contract is not a written instrument for purposes of the Statute of Frauds because it is in electronic, rather than paper, form. This argument is foreclosed by the Georgia Electronic Records and Signatures Act, which expressly provides that "[w]hen a rule of law requires a writing, an electronic record satisfies that rule of law." O.C.G.A. 10-12-4(c). Moreover, no court in the

Eleventh Circuit or in Georgia has ever held that an electronic contract violates the Statute of Frauds merely because it is in electronic, rather than paper, form.

Likewise, Silvario Garcia's electronic assent to the contract satisfies the Statute of Frauds signature requirement. Under the Georgia Electronic Records and Signatures Act, "[w]hen a rule of law requires a signature, an electronic signature satisfies that rule of law." O.C.G.A. § 10-12-4(d). Plaintiff expressly alleges that Silvario Garcia successfully entered into the Xbox LIVE contract. Compl. ¶ 8. Paragraph 1 of that contract provides:

> Xbox Live (the "Service") is offered to you conditioned on your acceptance without modification of these terms, conditions, and notices contained herein. By selecting "ACCEPT" below, you are attaching ***your electronic signature*** to and agreeing to this Agreement. You understand that if you do not agree to this Agreement, you should select "DECLINE", discontinue your registration, and refrain from using Xbox Live.

Terms of Use ¶ 1 (emphasis added). As this provision makes clear, to contract for Xbox LIVE service, Silvario Garcia had to electronically accept the terms of the agreement and attach his "electronic signature" to the contract. Under the Georgia Electronic Records and Signatures Act, Silvario Garcia's electronic signature constitutes a written signature for purposes of the Statute of Frauds.

Plaintiff's Statute of Frauds arguments defy common sense and contravene the prevalence of online contracts entered into electronically in millions of agreements between companies and their customers in Georgia and elsewhere. Recognizing the common use of online contracts, courts around the country have consistently held that electronically accepting the terms of such agreements (sometimes referred to as "click-wrap" or "click-through" agreements) is tantamount to signing a document, making such agreements valid and enforceable even though they are "unsigned" in the more traditional form of pen ink on paper. *See, e.g., F.T.C. v. Cleverlink Trading Ltd*., No. 05 C 2889, 2006 WL 3106448, at *6 (N.D. Ill. Oct. 26, 2006) (rejecting argument that an electronic agreement was unenforceable as unsigned because "[t]he fact that the acceptance may have come electronically in the form of a click in a box is analytically meaningless, as all the cases have held."); *Treiber & Straub, Inc. v. United Parcel Serv., Inc.,*No. 04-C-0069, 2005 WL 2108081, at *7 (E.D. Wis. Aug. 31, 2005) ("The undisputed facts establish that the plaintiff would not have been able to complete the shipping process and receive an air bill if it had not clicked on the Terms and Conditions and agreed to them."); *DeJohn v. The .TV Corp. Int'l.,* 245 F. Supp. 2d 913, 921 (N.D. Ill . 2003) ("click-wrap" agreement valid and enforceable contract and "[t]he fact that the contract is electronic does not affect this conclusion"); *Koresko v. RealNetworks, Inc.,* 291 F. Supp. 2d 1157, 1162-1163 (E.D. Cal. 2003) (clicking box on the screen marked, "I agree" on Web site evidenced express agreement to terms); *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.,* 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (clicking "I agree" box an appropriate way to form enforceable contract); *Stomp,* *Inc. v. NeatO, LLC,* 61 F. Supp. 2d 1074, 1081 (C.D. Cal. 1999) (enforcing assent to terms by clicking "accept" button). The same result should follow here.

For all of these reasons, Plaintiff's contention that the contract violates the Statute of Frauds fails as a matter of law, and for this additional reason, his fraud and deceit claim should be dismissed.

C. Plaintiff's Fraudulent Inducement Claim Should be Dismissed.

1. Plaintiff does not allege facts sufficient to state a claim for fraudulent inducement.

Plaintiff alleges that Microsoft fraudulently induced Silvario Garcia to enter into the Xbox LIVE contract, as well as the subsequent renewals of the contract, even though Microsoft knew that the contract was unenforceable against minors. Compl. ¶¶ 24-25. Plaintiff further alleges that Microsoft fraudulently induced Silvario Garcia to enter into the contract even though such "multiple-year contracts" must be in writing under Georgia's Statute of Frauds. *Id.* ¶ 26.

As an initial matter, these allegations fail to articulate the elements of fraudulent inducement. To state a claim for fraudulent inducement, Plaintiff must allege that: (i) Microsoft made false representations of fact to Silvario Garcia; (ii) Microsoft knew the representations were false; (iii) Microsoft intended to deceive him; (iv) he justifiably relied upon the representations; and (v) he was proximately injured by the representations. *See Todd v. Martinez Paint & Body, Inc.*, 517 S.E.2d 844, 845-46

(Ga. Ct. App. 1999). Here, as in Plaintiff's fraud and deceit claims, Plaintiff does not even allege that Microsoft made any false representation of fact to his son. And, as set forth in Section III(B)(2) above, misrepresentations regarding the enforceability of Silvario Garcia's contract cannot give rise to fraud liability. Plaintiff's pleading shortcomings do not stop there – Plaintiff also fails to allege that Silvario Garcia relied on Microsoft's purported misrepresentations as to the enforceability of the contract or that such reliance was justifiable, as Plaintiff must to state a claim for fraudulent inducement. *Todd,* 517 S.E.2d at 846. Plaintiff's fraudulent inducement allegations are facially insufficient to state a claim, and the fraudulent inducement claim should be dismissed.

2. *Plaintiff has not alleged rescission.*

Even if Plaintiff had sufficiently alleged the elements of fraudulent inducement (and he has not), Plaintiff's claim would still fail as a matter of law because Plaintiff has not alleged that his son rescinded the Xbox LIVE contract. It is well-established under Georgia law that a party suing for fraudulent inducement has two options: affirm the contract and sue for breach, or rescind the contract and sue for fraud. *Carpenter v. Curtis*, 395 S.E.2d 653, 655 (Ga. Ct. App. 1990) ("Two actions are available to one who was fraudulently induced by misrepresentations into entering a contract: he can affirm the contract and sue for breach or seek to rescind and sue in tort for fraud and deceit.") (internal citations and quotations omitted); *see also Velten v. Regis B. Lippert,* *Intercat, Inc*., 985 F.2d 1515, 1522 (11th Cir. 1993). When the plaintiff affirms a contract with a merger clause, he waives any claim for fraud in the inducement. *See Carpenter,* 395 S.E.2d at 655 ("Where a purchaser affirms a contract containing a merger provision, 'he is estopped from asserting that he relied upon the seller's misrepresentation and his action for fraud must fail.'") (citations omitted).

Accordingly, Plaintiff's fraudulent inducement claim can only proceed if: (i) Silvario Garcia rescinded the underlying agreement; or (ii) the underlying agreement contains no merger clause. Plaintiff can satisfy neither requirement. First, the Xbox LIVE contract contains a merger clause, which states, in relevant part:

> Except as expressly stated herein, this Agreement constitutes the entire agreement between you and Microsoft with respect to the Service, and it supersedes all prior or contemporaneous communications and proposals, whether electronic, oral or written, between you and Microsoft with respect to the Service.

Terms of Use at ¶ 17. This merger clause is virtually identical to the merger clause at issue in *Carpenter,* 395 S.E.2d at 654 ("This Agreement contains the entire understanding between the parties hereto with respect to the transactions contemplated hereby; all prior negotiations and agreements between the parties hereto are superseded by this Agreement"). There, the Georgia Court of Appeals held that the plaintiff was estopped from asserting a fraudulent inducement claim based on the existence of the merger clause and the plaintiff's failure to rescind. *See Carpenter*, 395 S.E.2d at 656.

Under *Carpenter,* the merger clause in Silvario Garcia's contract precludes Plaintiff from asserting that his son was fraudulently induced to enter into the contract unless Plaintiff alleges that the contract has been rescinded. *Id*. Plaintiff's Complaint contains no such allegation. As an initial matter, Plaintiff's Complaint makes clear that Silvario Garcia never rescinded the initial Xbox LIVE contract Plaintiff challenges here. Plaintiff concedes that the initial one-year agreement was in effect from October 2005 to October 2006, at which point it automatically renewed for a second year. Compl. ¶¶ 8-9. Accordingly, there can be no argument that the initial contract was rescinded.

Nor could Plaintiff argue that Microsoft's payment of a full refund related to the renewed agreement somehow constitutes legal rescission of that contract. *See* Compl. ¶ 11 ("On October 6, 2006, the $49.99 subscription fee was refunded to the Plaintiff by the Defendant."). The mere allegation that a party received a refund does not establish rescission. In Georgia, a defrauded party can only rescind a contract if it "promptly, upon discovery of the fraud, restore[s] or offer[s] to restore to the other party whatever he has received by virtue of the contract if it is of any value." O.C.G.A. § 13-4-60. Accordingly, '"[i]n order to rescind a contract and sue for restitution, a plaintiff must first restore or make a bona fide effort to restore to the other party whatever benefits he has received from the transaction.'" *Daly v. Mueller*, 630 S.E.2d 799, 801 (Ga. Ct. App, 2006). Here, Plaintiff does not allege that Silvario Garcia offered to return the benefit he received from the transaction, or that he did so promptly after learning of the alleged fraud. Indeed, the Complaint is silent as to whether Silvario Garcia made any attempt whatsoever to rescind the agreement. Plaintiff's failure to allege satisfaction of the condition precedent of rescission bars his fraudulent inducement claim.[5]

Plaintiff cannot cure this deficiency by amending the Complaint to expressly seek rescission as a remedy. Under Georgia law, "rescission must occur prior to, and as a condition precedent to, the bringing of an action; it is too late to claim rescission by asserting it for the first time in the pleadings." *Wender & Roberts, Inc. v. Wender*, 518 S.E.2d 154, 160 (Ga. Ct. App. 1999). Plaintiff was therefore obligated to rescind the contract before filing this lawsuit. Plaintiff failed to do so, and his fraudulent inducement claim should be dismissed.

D. Plaintiff's Conversion Claim Should be Dismissed.

Plaintiff's conversion claim must be dismissed because such a claim does not exist in Georgia for the recovery of money. To state a claim for conversion under Georgia law, the plaintiff must allege: (i) title to the property or the right of possession;

[5] Any argument that Plaintiff may rescind the agreement merely by filing this lawsuit because Silvario Garcia is a minor likewise fails as a matter of law. It is well-established that a minor is estopped from repudiating an agreement where, as here, he misrepresents his age when entering into an agreement and where he has "received, enjoyed, and consumed [the contract's] irrestorable benefits." *Carney v. Southland Loan Co.*, 92 Ga. App. 559, 562 (Ga. Ct. App. 1955). Accordingly, Plaintiff was obligated to rescind the agreement prior to filing this lawsuit. He did not, and thus his fraudulent inducement claim fails as a matter of law.

(ii) actual possession by the defendant; (iii) demand for return of the property; (iv) and refusal by the defendant to return the property. *See Metzger v. Americredit Fin. Servs., Inc.*, 615 S.E.2d 120, 122 (Ga. Ct. App. 2005). It is well-settled in Georgia that no claim for conversion exists when the plaintiff seeks to recover a sum of money. *See, e.g., Taylor v. Powertel, Inc.,* 551 S.E.2d 765, 769 (Ga. Ct. App. 2001) ("[T]here can be no conversion action for money damages for money, because generally, money is not subject to a civil action for conversion."); *Lincoln Nat'l. Life Ins. Co. v. Davenport*, 410 S.E.2d 370, 371 (Ga. Ct. App. 1991) (same); *Hodgkins v. Markatron*, 365 S.E.2d 494, 495 (Ga. Ct. App. 1988) (same).

In the Complaint, Plaintiff alleges that Microsoft "converted the Representative Plaintiff's funds" by procuring Xbox LIVE subscription fees. Compl. ¶ 30-34. Plaintiff does not seek to recover any tangible physical property. Instead, Plaintiff seeks to recover a sum of money generally. *See, e.g.,* Compl. ¶¶ 10, 30-34. "[T]his is not such a case for which a cause of action for conversion was intended." *See Davenport*, 410 S.E.2d at 371. Consequently, Plaintiff's claim for conversion must be dismissed.

E. Plaintiff's Uniform Deceptive Trade Practices Act Claim Should be Dismissed.

Plaintiff's claim under Georgia's Uniform Deceptive Trade Practices Act (the "DTPA"), O.C.G.A. § 10-1-370 *et seq*., likewise fails as a matter of law. Plaintiff alleges that Microsoft violated the DTPA by entering into contracts that are unenforceable under the Statute of Frauds and by entering into contracts that are unenforceable against minors. Compl. ¶¶ 41-43. Plaintiff's claim fails because the DTPA does not render these alleged actions, even if true, unlawful.

Like the federal Lanham Act, Georgia's DTPA is limited in scope and only prohibits certain enumerated acts related to copyright and trade name:

> (1) Passing off goods or services as those of another;
>
> (2) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;
>
> (4) Using deceptive representations or designations of geographic origin in connection with goods or services;
>
> (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
>
> (6) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
>
> (7) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;
>
> (8) Disparaging the goods, services, or business of another by false or misleading representation of fact;
>
> (9) Advertising goods or services with intent not to sell them as advertised;

> (10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
>
> (11) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
>
> (12) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.[6]

O.C.G.A. § 10-1-372(a)(1)-(12). Plaintiff does not allege that Microsoft engaged in any of these deceptive trade practices. Rather, Plaintiff simply contends that Microsoft entered into unenforceable contracts. Because this alleged conduct does not fall within any of the enumerated deceptive trade practices remedied by the DTPA, Plaintiff's claim fails as a matter of law. *See Cox v. Athens Reg'l Med. Ctr., Inc.*, 631 S.E.2d 792, 798 (Ga. Ct. App. 2006) (DTPA claim dismissed where the plaintiff failed to allege facts showing that the defendant violated any of the enumerated prohibited practices).

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[6] Plaintiff cannot argue that subsection 12's prohibition of engaging in any other conduct which '"similarly creates a likelihood of confusion or of misunderstanding'" constitutes some sort of catch-all for generally deceptive conduct. Georgia courts have expressly found that "[t]he word 'similarly' in subsection (a)(12) means a trade practice that creates confusion or misunderstanding in a manner similar to the conduct prohibited in subsections (a)(1) thru (a)(11) of OCGA § 10-1-372, which generally bar deceptive trade practices involving fraudulent misrepresentations as to the origin, approval, quality, or description of goods or services; false advertising and factual statements about goods or services; and false or misleading statements about the reasons for, existence of, or amounts of price reductions." *Morrell v. Wellstar Health System, Inc.*, 280 Ga. App. 1, 6 (Ga. Ct. App. 2006).

Even if Plaintiff had alleged that Microsoft violated one of the enumerated deceptive trade practices of the DTPA, his claim would still fail because he has not alleged that his son is still a party to the Xbox LIVE contract. The only remedy allowed under the DTPA is injunctive relief. *See* O.C.G.A. § 10-1-373 (remedy for violation of the DTPA is injunctive relief and costs); *Catrett v. Landmark Dodge, Inc.*, 560 S.E.2d 101, 106 (Ga. Ct. App. 2002) ("[I]injunctive relief is the only remedy permitted by the UDTPA."); *Boynton v. State Farm Mut. Auto. Ins. Co.*, 429 S.E.2d 304, 306 n.1 (Ga. Ct. App. 1993) ("Civil damages are never available under [the DTPA]"); *Lauria v. Ford Motor Co.*, 312 S.E.2d 190, 193 (Ga. Ct. App. 1983) ("[T]he sole remedy provided under [the Deceptive Trade Practices] Act is injunctive relief"). Accordingly, Plaintiff can only bring a DTPA claim to bar ongoing or future wrongful conduct. *Catrett*, 560 S.E.2d at 106 ("By definition, an injunction [under the DTPA] provides relief from *future* wrongful conduct").

Here, Plaintiff has not alleged that his son has an ongoing contract with Microsoft. To the contrary, Plaintiff concedes that "[o]n October 6, 2006, the $49.99 subscription fee was refunded to the Plaintiff by the Defendant." Compl. ¶ 11. Because Plaintiff has not alleged any ongoing contractual relationship with Microsoft, he can obtain no relief under the statute, and his DTPA claim fails as a matter of law. *Catrett*, 560 S.E.2d at 106 (dismissing DTPA claim because the plaintiff "has not presented any evidence – or even alleged – that he 'is likely to be damaged' by [the defendant's] trade practices in the future.").

F. Plaintiff's Unjust Enrichment Claim Should be Dismissed.

Unjust enrichment is an equitable doctrine that provides that a '"benefitted party equitably ought to either return or compensate for the conferred benefits when there is no legal contract. . . .'" *Morris v. Britt*, 620 S.E.2d 422, 424 (Ga. Ct. App. 2005), cert. denied (Ga. Jan. 17, 2006). The doctrine of unjust enrichment is premised on the principle that '"a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received."' *Id.* Here, Plaintiff's allegations do not state a claim for unjust enrichment because: (i) a valid and enforceable contract existed between Silvario Garcia and Microsoft; (ii) Microsoft conferred upon Silvario Garcia the benefit he bargained for in exchange for Plaintiff's payment (namely a subscription to Xbox LIVE); and (iii) Silvario Garcia's own misconduct precludes Plaintiff from recovering in equity.

1. *Plaintiff's unjust enrichment claim fails because an enforceable contract existed between Silvario Garcia and Microsoft.*

It is well established that a plaintiff cannot recover under a theory of unjust enrichment when an enforceable contract exists. *Donchi, Inc. v. Robdol, LLC*, 640 S.E.2d 719, 724 (Ga. Ct. App. 2007) ('"An unjust enrichment theory does not lie where there is an express contract."'); *Smith Serv. Oil Co. v. Parker*, 549 S.E.2d 485, 487 (Ga. Ct. App. 2001) ("'[t]he theory of unjust enrichment applies when there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated.'"). Plaintiff admits in the Complaint that a contract existed between Silvario Garcia and Microsoft; Plaintiff simply argues that the contract was unlawful. *See*, *e.g.*, Compl. at ¶¶ 9, 48. But, as discussed more fully in Section III(B)(4) above, the contract between Silvario Garcia was valid and enforceable. Accordingly, Plaintiff's unjust enrichment claim should be dismissed.

2. Silvario Garcia received value from Microsoft in return for the payments.

A plaintiff cannot recover on a claim for unjust enrichment when the defendant provided the plaintiff with the benefit for which the plaintiff bargained. *CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Group*, 642 S.E.2d 393, 399 (Ga. Ct. App. 2007); *see also Morris v. Britt*, 620 S.E.2d 422, 424 (Ga. Ct. App. 2005) *cert. denied* (Ga. Jan. 17, 2006). Here, Plaintiff admits in the Complaint that Silvario Garcia received from Microsoft exactly what he bargained for – a one-year subscription to Xbox LIVE. *See* Compl. ¶ 8. Because Silvario Garcia received a subscription to Xbox LIVE in return for the payment of a subscription fee, Plaintiff's claim for unjust enrichment fails as a matter of law.

3. Plaintiff cannot state a claim for unjust enrichment because Silvario Garcia has unclean hands.

A party with unclean hands cannot recover in equity. *Hollifield v. Monte Vista Biblical Gardens, Inc.*, 553 S.E.2d 662, 667 (Ga. Ct. App. 2001) ("When a party comes into court with unclean hands, equity will not grant relief to such a party."). Because unjust enrichment is primarily an equitable doctrine, a party with unclean hands cannot prevail on an unjust enrichment claim. *See id*.

As set forth in Section III(B) above, Microsoft's contract required Silvario Garcia to represent that he was of legal majority as a condition of the contract. Silvario Garcia's written misrepresentation of his age precludes the unjust enrichment claim. *See Hood v. Duren*, 125 S.E. 787, 788 (Ga. Ct. App. 1924) ("A defendant is estopped from exercising his privilege of avoiding a fair and reasonable contract upon the ground of his minority at the time the agreement was made, where it appears that he received, enjoyed, and consumed its irrestorable benefit, and where it appears that the plaintiff, dealing in good faith, was induced to act to his injury by reason of the false and fraudulent misrepresentation of the defendant with respect to his apparent majority."); *see also Carney v. Southland Loan Co.*, 88 S.E.2d 805, 806 (Ga. Ct. App. 1955) (minor plaintiff who fraudulently represented that he was 22 years old estopped from repudiating contract on ground of minority). Because Microsoft was induced to enter into the Xbox LIVE contract by reason of Silvario Garcia's written misrepresentation of his age, Plaintiff cannot now recover under unjust enrichment on the ground that the contract was unenforceable.[7] Accordingly, Plaintiff's unjust enrichment claim should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

DATED this 15th day of October, 2007.

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[7] Because Plaintiff asserts his claims on behalf of Silvario Garcia, he is subject to any defenses that could be asserted against Silvario. *See Newsome v. Department of Admin. Svcs.*, 526 S.E.2d 871, 873 (1999).

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L.R. 7.1(D) CERTIFICATION

I hereby certify that Defendant's Motion to Dismiss has been prepared in Times New Roman font, 14 point, pursuant to L.R. 5.1(C).

/s/ Kristy Brown
Kristine McAlister Brown

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2007, I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 15th day of October, 2007

/s/ Kristy Brown
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